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VERONICA HANDY, ESQUIRE

CLERK OF THE COURT

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DEAN A. MOLLOY,	)	S. Ct. Crim. No. 2019-0004
Appellant/Petitioner,	)	Re: Super. Ct. Misc. No. 67/2018 (STX)
	)	
v.	)	
	)	
GOVERNMENT OF THE VIRGIN	)	
ISLANDS,	)	
Appellee/Respondent.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: December 10, 2019
Filed: August 17, 2022

Cite as: 2022 V.I. 16

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA CABRET**, Associate Justice and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Dean Molloy
St. Croix, U.S.V.I.
Pro Se,

Aysha R. Gregory, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Appellant Dean Molloy (“Molloy”) appeals the Superior Court’s denial of his petition to expunge his criminal record. We conclude that Molloy’s gubernatorial pardon fails to eradicate his criminal record; therefore, he did not fall within the confines of the Virgin Islands expungement statute, which specifically states the Superior Court may exercise its discretion to expunge a petitioner’s record provided the petitioner was not convicted of a crime.^{1, 2} For the reasons elucidated below, we affirm the Superior Court’s decision concluding that Molloy lacked the qualification to have his criminal record of convictions for second degree murder and possession of a dangerous weapon expunged pursuant to the Virgin Islands expungement statute.³

I. FACTS AND PROCEDURAL HISTORY

¶2 On May 10, 1990, a jury convicted Molloy of second degree murder, in violation of 14 V.I.C. § 922(b), and possession of a dangerous weapon, in violation of 14 V.I.C. § 2251(a).

¶3 On November 19, 1996, Molloy was released from incarceration.

¹ “The records of an arrest, a criminal complaint or information that **does not result in conviction** must be expunged upon Petition to the Court: (1) Where the case has been dismissed without prejudice and the statute of limitation has expired. (2) Where the case has been tried and was an acquittal. (3) Where there is a statement of Nolle Prosequi and the People have not filed an information or complaint and the statute of limitation has expired.” 5 V.I.C. § 3733 (a).

² “The records of an arrest, a criminal complaint or information that **does not result in conviction** may be expunged by petition to the court except: (1) Where a person flees the jurisdiction to avoid prosecution; or (2) Where a person has a subsequent arrest, unless there are extraordinary circumstances to which the court finds expungement in the best interest of public policy.” 5 V.I.C. § 3733 (b).

³ Judge Douglas Brady stated specifically in the Superior Court’s December 18, 2018 order that the Virgin Islands lacks an expungement statute that expunges felony convictions.

¶4 On December 30, 2006, former Virgin Islands Governor Charles Turnbull executed an executive pardon on Molloy's behalf. The pardon stated that despite his two felony convictions, Molloy had participated in numerous community endeavors and obtained several academic distinctions following his release which warranted the pardon's issuance.

¶5 On August 13, 2018, Molloy filed a petition in Superior Court to expunge his criminal record. In the petition, Molloy argued the governor's pardon entitled him to an expungement of his criminal record.

¶6 In a December 19, 2018 opinion, the Superior Court denied Molloy's expungement petition and opined that the Virgin Islands Code lacks a statute that allows for the expungement of felony convictions. In the opinion, the Superior Court further concluded that a gubernatorial pardon, standing alone and without legislative authority, did not support the action Molloy sought.

¶7 On July 15, 2019, Molloy perfected the instant appeal.

II. JURISDICTION

¶8 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (2012)). Because the Superior Court's December 18, 2019 order denying Molloy's expungement petition disposed of all claims submitted to it for adjudication, the order is final and we exercise jurisdiction over Molloy's appeal.

III. STANDARD OF REVIEW

¶9 We review the trial court's factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (2010)). "However, in ruling on the correctness of discretionary rulings, such as those granting or denying motions to suppress evidence or for severance, we review only for abuse of discretion." *Ponce v. People*, 72 V.I. 828 (V.I. 2020) (citations omitted).

IV. DISCUSSION

¶10 On appeal, Molloy challenges the Superior Court's denial of his petition to expunge his felony convictions.

¶11 A pardon is an "act or an instance of officially nullifying punishment or other legal consequences of a crime." BLACK'S LAW DICTIONARY 938 (10th ed. 2014). A full or absolute pardon absolves a wrongdoer from punishment and restores his civil rights. *Id.* Locally, the Virgin Islands expungement statutes delineate instances when an individual's criminal record must be expunged.⁴ See *supra* notes 1 & 2. Although the definition of a pardon is seemingly direct, individual states and the federal government differ on the effect of pardons.

⁴ Incidentally, after the 2015 amendment of 5 V.I.C. § 3732 by V.I. Act no. 7742, § 2, there are essentially two main Virgin Islands expungement statutes and neither provides for discretionary expungement except in a few enumerated circumstances. Specifically, before the 2015 amendment, 5 V.I.C. § 3732 contained language in the introductory paragraph which stated that criminal records "may be expunged" in situations described in subsections 1 through 4 of the statute. However, the 2015 amendment basically eliminated the discretionary language in section 3732 and made expungement of an offender's criminal record mandatory in the same subsections where expungement was originally discretionary. Moreover, in subsections (a)(1) through (a)(3), 5 V.I.C. § 3733 also addresses circumstances in which an offender's criminal record must be expunged. However, section 3733 delineates circumstances in which expungement of an offender's criminal record remains discretionary. Specifically, in subsections (b)(1) and (b)(2) of section 3733, the court retains discretion to grant expungement if the records of an arrest, a complaint, or an information do not result in a conviction unless (1) A person flees the jurisdiction to avoid prosecution; or (2) A person has a subsequent arrest, unless there are extraordinary circumstances to which the court finds expungement in the best interest of public policy. Finally, 5 V.I.C. § 3734 expressly provides that misdemeanor offenses are subject to the mandatory expungement provisions in 5 V.I.C. §§ 3732 and 3733. See *In re Callwood*, 66 V.I. 299, 303-07 (V.I. 2017) (explaining that the 2015 legislation to amend the local expungement statute reflects the Legislature's intent to enlarge the number of mandatory expungements).

¶12 In *Ex parte Garland*, 71 U.S. 333, 380 (1866), the United States Supreme Court opined in its seminal case that “[a] pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out [the] existence [of] guilt” However, since the decision, the Supreme Court has streamlined the broad *Ex parte Garland* ruling to acknowledge the legal limits of pardons. See *Knote v. United States*, 95 U.S. 149, 152 (1877) (“[While] a full pardon releases the offender from all disabilities imposed by the offence pardoned, it does not affect the rights which have vested in others directly by the execution of the judgment for the offence or which have been acquired by others [while] the judgment was in force. And if the proceeds of property of the offender sold under the judgment have been paid into the treasury, the right to them has so far become vested in the United States that they cannot be recovered by him through an act of Congress.”); *Carlesi v. New York*, 233 U.S. 51, 59 (1914) (“[W]e must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority . . . for taking into consideration past offenses committed by the accused as a circumstance of aggravation, . . . although for such past offences there had been a pardon granted.”). Lastly, “[m]odern case law has dismissed the ‘blotting out’ language from *Ex parte Garland* as dictum and rejected [its] expansive view of the pardon power.” *State v. Radcliff*, 978 N.E.2d 1275, 1283 (Ohio Ct. App. 2012). See *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) (noting “a pardon does not ‘blot out guilt’ nor does it restore the offender to a state of innocence in the eye of the law as suggested in *Ex parte Garland*”); *State v. Skinner*, 632 A.2d 82, 84 (Del. 1993) (noting that “[w]hile the [United States] Supreme Court, in *Ex parte Garland*, . . . stated that a full pardon ‘releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense,’ that dictum has since been

rejected”); *Hirschberg v. Commodity Futures Trading Comm’n*, 414 F.3d 679, 682 (7th Cir. 2005) (rejecting reliance on *Ex parte Garland*, noting that modern caselaw emphasizes . . . that this historical language was dicta and is inconsistent with current law”); *United States v. Noonan*, 906 F.2d 952, 958 (3rd Cir. 1990) (noting the Supreme Court, by 1915, “made clear that it was not accepting the *Garland* dictum that a pardon ‘blots out [the existence of guilt]’”). Therefore, a pardon’s effect is constrained by Supreme Court proclamations after *Ex parte Garland* as well as state statutes and judicial interpretations.

¶13 The following cases illuminate and buttress the conclusion that Molloy is not entitled to expungement of his criminal felony conviction record because he obtained a gubernatorial pardon.

¶14 In *Harscher v. Commonwealth*, 327 S.W.3d 519, 522 (Ky. Ct. App. 2010), the Kentucky Court of Appeals ascertained the effect of a governor’s pardon on a petitioner’s request to have his criminal record expunged. Although the petitioner argued that the governor’s full pardon eliminated his guilt and conviction and thereby expunged his record, the Court of Appeals disagreed. The Court concluded that, while the full pardon released the plaintiff from punishment and restored his civil liberties, the pardon failed to eliminate the plaintiff’s guilt or his conviction. However, the Court recognized that in Indiana and Pennsylvania, the grant of an executive pardon automatically expunged an individual’s criminal record. Regardless, the Court decided that the governor’s pardon did not automatically entitle the petitioner to an expungement of his criminal record.

¶15 In *State v. Radcliff*, 978 N.E.2d 1275 (Ohio Ct. App. 2012), the Ohio Court of Appeals reviewed the effect of pardons in other jurisdictions. The Court cited *R.J.L. v. State*, 887 So.2d 1268, 1279 (Fla. 2004), which noted “‘of the nine jurisdictions [to] have directly addressed

whether a pardon entitles an individual to records expunction,’ the majority ‘held that a pardoned individual is not entitled to records expunction.’” *Radcliff*, 978 N.E.2d at 1286. In *R.J.L.*, the Florida Supreme Court considered whether a pardon eradicated an individual’s adjudication of guilt so that he was entitled to expungement of his criminal record under the state’s expungement statute. 887 So.2d at 1271. The *R.J.L.* Court opined that “although ‘a pardon has the effect of removing punishment and disabilities, and restoring civil rights[,] . . . the denial of records expunction does not constitute a punishment’ and ‘eligibility for records expunction is not a civil right restored by the grant of a gubernatorial pardon.’” *Id.* at 1280. Thus, the *R.J.L.* Court decided a gubernatorial pardon did not eliminate an individual’s guilt, “creating a fiction that the crime never occurred.” *Id.* See *Bjerkan*, 529 F.2d at 126 (holding that a pardon “cannot erase the basic fact of conviction, nor can it wipe away the social stigma that a conviction inflicts”); *State v. Blanchard*, 100 S.W.3d 226, 230-31 (Tenn. Crim. App. 2002) (explaining that a pardon could not remove a defendant’s conviction and noting “[n]umerous state courts have also recognized that a pardon does not eradicate the underlying conviction but rather releases the defendant from further punishment”); *Skinner*, 632 A.2d at 85 (stating that “[w]hile the pardon may have forgiven [a defendant’s] conviction, it did not obliterate the public memory of the offense”); *People v. Thon*, 746 N.E.2d 1225, 1230 (Ill. App. Ct. 2001) (stating that “petitioner’s pardon did not erase his convictions” but “merely served to release petitioner from further punishment,” so that petitioner was “an individual previously convicted of a criminal offense” and “ineligible for expungement”); *State v. Bachman*, 675 S.W.2d 41, 51-52 (Mo. Ct. App. 1984) (concluding that while a “pardon gives new effect to the criminal conviction of a defendant, . . . [it] does not grant authority to close or expunge criminal records”); *Commonwealth v. Vickey*, 412 N.E.2d 877, 882 (Mass. 1980) (“[E]ven if a pardon may remit all penal consequences of a criminal conviction, it cannot

obliterate the acts which constituted the crime.”) (citations omitted); *In re Abrams*, 689 A.2d 6, 7 (D.C. 1997) (“[A]lthough the presidential pardon set aside Abrams’ convictions, as well as the consequences which the law attaches to those convictions, it could not and did not require the court to close its eyes to the fact that Abrams did what he did.”).

¶16 Moreover, most federal courts interpret a pardon’s effect as the majority of states do— an executive pardon does not afford an individual the right to automatic expungement of his criminal record. In *In re North*, 62 F.3d 1434 (D.C. Cir. 1994), the D.C. Circuit Court of Appeals reviewed proclamations from various federal courts to evaluate whether a government official who received a presidential pardon for an independent counsel indictment was entitled to attorney’s fees. The Court stated that, under the relevant statute, the official could only receive attorney’s fees if the pardon eliminated the indictment. In ruling against the official, the Court cited several federal decisions including *United States v. Noonan*, 906 F.2d 952 (3rd Cir. 1990) and *Burdick v. United States*, 236 U.S. 79 (1915). The Court said *Burdick* implicitly rejected *Ex parte Garland’s* dictum and recognized the acceptance of a pardon implies a confession of guilt. *In re North*, 62 F.3d at 1437. Similarly, the Court said that *Noonan* was pertinent “because the recipient of a Presidential pardon in that case unsuccessfully requested a court order that he ‘may as well as all others must, consider the criminal indictment expunged as if it never occurred.’” *Id.* The *Noonan* Court reasoned, “[t]hus, on the basis of long-held traditional views on the effect of a pardon, covering diverse periods and sources from Bracton and Blackstone to Professor Williston, from seventeenth century English cases to those in contemporary courts of Great Britain and the British Commonwealth, from 1915 teachings of the Supreme Court, and the 1975 analysis of the Court of Appeals of the Seventh Circuit, we conclude the Presidential pardon of 1977 does not eliminate

Noonan's 1968 conviction and does not 'create any factual fiction' that Noonan's conviction had not occurred to justify expunction of his criminal record." *Id.* (citing *Noonan*, 906 F.2d at 960). See *State v. Chiaverini*, No. L-00-1306, 2001 WL 256104, at *2 (Ohio Ct. App. Mar. 16, 2001) (unpublished) (stating that "although the judicial power to grant an expungement request still exists, . . . it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice"); *S.E.C v. Lewis*, 423 F.Supp.2d 337, 341 (S.D.N.Y. 2006) ("[C]ontrary to popular belief, modern caselaw holds that a pardon 'in no way reverses the legal conclusion of the courts; it does not blot out guilt or expunge a judgment of conviction.'").

¶17 Likewise, the local expungement statute eschews and rejects Malloy's contention that he is entitled to expungement of his felony criminal convictions because he obtained a gubernatorial pardon.

¶18 Locally, although the Virgin Islands Legislature has expressed an interest in assisting the "[m]any people ... unable to find work or housing" due to their criminal records, with the enactment in 2015 of Act No. 7742, the "Second Chance for Jobs, Housing and Education After a Misdemeanor Conviction Act," the various provisions in the Virgin Islands expungement statutes fail to allow for the expunction of felony convictions. Specifically, section 3737 reflects a continued hesitancy to expand expungement of criminal records to convicted felons. An individual who has been convicted of a felony would never meet the deadline requirements established by section 3737 because a convicted felon is incarcerated for more than a year under the Virgin Islands

Code.^{5, 6} Importantly, and most significantly, the language of section 3733 applies only to “records of an arrest, a criminal complaint, or an information that *does not result in a conviction.*” (Emphasis added.)

¶19 Moreover, Section 3732⁷ directs the Superior Court to expunge a criminal record pursuant to specific requirements that are either inapplicable to a felony conviction (completion of the Pretrial Intervention Program) or do not involve a conviction (a statement of Nolle Prosequi, dismissal with prejudice with no other charges or arrest pending, or an arrest with no complaint or information filed coupled with the expiration of the statute of limitations). Section 3733(a) requires the Superior Court to grant an expungement of arrest records, a complaint, or an information in all cases that do not result in a conviction, except in the two excluded circumstances identified in section 3733(b), which are irrelevant here: “except [w]here a person flees the jurisdiction to avoid

⁵ “Notwithstanding an Act of the Legislature to the contrary- (1) a felony is a crime or offense which is punishable by imprisonment for more than one year. . .” 14 V.I.C. § 2(b)(1).

⁶ “(a) Waiting times are calculated from the day a person completes the jail term or probation term whichever is later.

(b) Waiting times are as follows:

(1) A person who serves between zero and 14 days in jail must wait 6 months before filing a Petition for Expungement of the conviction.

(2) A person who serves between 14 days and 60 days must wait 1 year before filing a Petition for Expungement of the conviction.

(3) A person who serves between 61 days and 180 days must wait 2 years before filing a Petition for Expungement of the conviction.

(4) A person who serves between 181 and three hundred and sixty five 365 days must wait 5 years from before filing a Petition for Expungement of the conviction.” 5 V.I.C. § 3737(a) & (b).

⁷ “Expungement of criminal records-when they may be expunged -

The arrest record, including fingerprints, mugshots and DNA samples, and any other police or judicial proceeding records of a person must be expunged upon petition to the Superior Court of the Virgin Islands when:

(1) A person successfully completes the Pretrial Intervention Program under title 5 V.I.C., Section 4611 et seq.;

(2) A person has received a statement of Nolle Prosequi, because the People are unable to meet their burden of proof;

(3) A person whose case has been dismissed with prejudice and the person has no other charges or arrest pending; or

(4) A person has been arrested, and no complaint or information has been filed and the statute of limitation has expired.” 5 V.I.C. § 3732.

prosecution; or [w]here a person has a subsequent arrest, unless there are extraordinary circumstances to which the court finds expungement in the best interest of public policy."

¶20 Only Section 3734⁸ specifically addresses the situation where an arrest that resulted in a conviction can be expunged: that of a misdemeanor conviction. ("The Court may expunge the record of a misdemeanor conviction of an individual . . . upon the petition of the individual and subject to the provisions of this chapter and rules of the Court.") This statutory scheme thus explicitly authorizes the trial court to only address a petition for expungement of a misdemeanor conviction of a person who has received an executive pardon.

¶21 Additionally, arguing that the pardon applies retroactively to erase a conviction in its entirety is contrary to a basic tenet that has been established for nearly a century and a half that a pardon does not have retrospective effect on civil disabilities resulting from a conviction, absent a specific statute allowing otherwise. *Bryan v. Fawkes*, 61 V.I. 416, 429 (V.I. 2014)^{9, 10}, disagreement on other grounds in *Nelson v. Fawkes*, No. CV 2018-0017, 2018 WL 3132592, at *3 n.3 (D.V.I. June 25, 2018).

⁸ "(a) The Court may expunge the record of a misdemeanor conviction of an individual, including fingerprints, photographs, and DNA samples, and records or other police or judicial proceedings of the individual, upon the petition of the individual and subject to the provisions of this chapter and rules of the Court. Any person wishing to have his record of misdemeanor conviction expunged must petition the Court and send a copy of the Petition to the Department of Justice.

(b) The Department of Justice has the burden of proving by clear and convincing evidence that a Petition for Expungement should not be granted. The Court shall grant the Petition for Expungement, if the Department of Justice fails to meet its burden." 5 V.I.C. § 3734.

⁹ "[W]e emphasize that we agree with the District Court's conclusion that the Governor's pardon could not operate retroactively." *Bryan v. Fawkes*, 61 V.I. at 456, n.19.

¹⁰ In *Payne v. Fawkes*, the District Court, in reliance of *Knote v. United States*, 10 Ct. Cl. 397 (1874), held that "[a] pardon affords no relief for the disabilities suffered by the offender prior to the issuance of the pardon" -in that case, curing of nomination papers. CV 2014-053, 2014 WL 4499559, at *6 (D.V.I. Sept. 12, 2014). The next month, in *Bryan v. Fawkes*, 61 V.I. 416, 429 (V.I. 2014), this Court noted that the Virgin Islands has a statute that allows for such a cure at the Superior Court's discretion.

¶22 Also, allowing an executive pardon to direct the judicial expungement of a felony conviction in the absence of clear legislative intent raises concerns about separation of powers. *See United States v. Noonan*, 906 F.2d 952, 956 (3d Cir. 1990) ("[T]he notion that the President has the ability, through the pardon power vested under Article II, § 2, to tamper with judicial records is a concept jurisprudentially difficult to swallow.").

¶23 Essentially, an expungement of criminal records should be limited to "extraordinary, exceptional, or extreme circumstances," *Santiago v. People*, 51 V.I. 283, 295 (V.I. 2009). Therefore, we are mindful of the fact that the Virgin Islands does not have a statute specifically allowing for the expungement of a criminal record of a convicted felon, and we are also cognizant of the potential separation of powers conflict.

¶24 In this case, despite contrary statutory language, the dissent argues that section 3733(b) gives the Superior Court discretion to grant criminal records expunction even if an offender has been convicted of a felony. (Dissent ¶3).

¶25 However, 5 V.I.C § 3733(b) clearly states that an individual may petition the Superior Court for records expunction only if he has not been convicted. Although Molloy received a gubernatorial pardon, the pardon does not erase Molloy's conviction, as the preceding discussion demonstrates. As the state and federal courts that have considered the effect of pardons have said, an executive pardon fails to eliminate a defendant's conviction. Rather, a pardon functions as a means to release a defendant from custody and restore his civil liberties. A pardon does not automatically entitle an individual to records expunction and, despite the dissent's assertions, it does not trigger the auspices of section 3733(b) because the defendant's conviction stands. *See* U.S. Dept. of Justice, Office of Legal Counsel, *Whether a Presidential Pardon Expunges Judicial*

and Executive Branch Records of a Crime, at 1 (Aug. 11, 2006), available at https://www.justice.gov/sites/default/files/olc/opinions/2006/08/31/pardonopfinal_0.pdf (last visited Aug. 20, 2020) (stating that while “a presidential pardon removes, either conditionally or unconditionally, the punitive legal consequences that would otherwise flow from conviction for the pardoned offense,” a pardon “does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct”). Accordingly, the Superior Court cannot exercise its discretion to expunge Molloy’s felony criminal record pursuant to § 3733(b) because his standing conviction precludes records expungement under that statute. Therefore, the Superior Court did not abuse its discretion when it denied Molloy’s petition to expunge his criminal felony record, because the court was unable to do so under the current version of the Virgin Islands expungement statute.

V. CONCLUSION

¶26 To conclude, because Molloy’s gubernatorial pardon did not obliterate his felony convictions, he is not entitled to records expunction under the Virgin Islands expungement statute. Therefore, we affirm the Superior Court.

Dated this 17 day of August 2022

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ReishaCorneiro
Deputy Clerk II

Date: August 17, 2022

HODGE, C.J., concurring in part and dissenting in part.

¶ 27 I agree with the majority that the grant of a gubernatorial pardon, standing alone and without more, does not mandate the expungement of any court records relating to the former conviction. I write separately, however, because unlike the majority, I would conclude that the recipient of a gubernatorial pardon may seek a discretionary expungement pursuant to title 5, section 3733(b) of the Virgin Islands Code.

¶ 28 In the Virgin Islands, the Revised Organic Act of 1954 (“ROA”), the *de facto* Constitution of the Virgin Islands, provides that “[t]he Governor . . . may grant pardons and reprieves and remit fines and forfeitures for any offenses against local laws.” 48 U.S.C. § 1591. The Constitution of the United States, similarly, grants the President “power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” U.S. CONST. art. II, § 2. With respect to provisions relating to the structure of the Virgin Islands government, absent legislative history or other indication to the contrary, we must presume that “when Congress includes undefined language in the Revised Organic Act that it borrows from or previously used in another federal statute, it is deemed to be aware of how that same language had been interpreted by the United States Supreme Court and to have intended to reach the same result with respect to the Virgin Islands.” *Bryan v. Fawkes*, 61 V.I. 201, 231 (V.I. 2014) (quoting *Ward v. People*, 58 V.I. 277, 283-84 (V.I. 2013) (internal quotation marks omitted)). While the pardon powers respectively codified in the Revised Organic Act and the United States Constitution do not use identical language, I agree based on the overwhelming federal and state court authority cited in the majority opinion that the drafters of the Revised Organic Act could not have intended for the grant of a pardon by the Governor of the Virgin Islands to automatically require the expungement of all records maintained by the Judicial Branch, a co-equal branch of government.

¶ 29 But while the Revised Organic Act does not mandate the automatic expungement of such records, I believe that the Legislature has established a statutory right for the recipient of a gubernatorial pardon to seek a discretionary expungement from the Superior Court. Specifically, the Legislature has provided that

The records of an arrest, a complaint or an information **that does not result in a conviction** may be expunged by petition to the court except:

- (1) Where a person flees the jurisdiction to avoid prosecution; or
- (2) Where a person has a subsequent arrest, unless there are extraordinary circumstances to which the court finds expungement in the best interest of public policy.

5 V.I.C. § 3733(b) (emphasis added). This provision, by its own terms, authorizes the Superior Court to grant a discretionary expungement of arrest records, a complaint, or an information in all cases that do not result in a conviction, except in the two excluded circumstances identified above, which are not relevant here. Ultimately, the question of whether a pardon recipient may seek a discretionary expungement under section 3733(b) is one of statutory interpretation: what did the Legislature mean by the phrase “does not result in a conviction”?

¶ 30 The majority holds that section 3733(b) is inapplicable to this cause because a pardon recipient has, in fact, been convicted, and the gubernatorial pardon purportedly does not erase or eliminate the conviction. But in interpreting the pardon power codified in the United States Constitution, the Supreme Court of the United States has expressly held that “the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offence itself.” *Carlisle v. United States*, 83 U.S. 147, 151 (1872). The United States Supreme Court further determined that “when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as

innocent as if he had never committed the offence” and transforms the recipient into “a new man.”
Ex Parte Garland, 71 U.S. 333, 380-81 (1867).

¶ 31 The majority dismisses these clear and unequivocal pronouncements by the United States Supreme Court by asserting that this “expansive view” has since been “rejected.” Yet curiously, the majority does not cite to any subsequent decision of the United States Supreme Court stating so – rather, the only authorities cited are decisions of lower courts and a 2006 memorandum prepared by the United States Department of Justice. But the Supreme Court of the United States has itself repeatedly and emphatically held that it—and only it—can overturn its own precedents. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is this Court's prerogative alone to overrule one of its precedents.”); *Rodriguez de Quijas v. Searson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

¶ 32 And while the majority, perhaps to sidestep the reality that the United States Supreme Court has not overruled its *Garland* and *Carlisle* precedents, implies that the pertinent language is mere dicta, it ignores the overwhelming authority providing that even dicta in opinions issued by the United States Supreme Court constitute binding precedent. *See, e.g., In re Pre-Filled Propane Antitrust Litigation*, 860 F.3d 1059, 1064 (8th Cir. 2017) (“[F]ederal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court's outright holdings.”) (collecting cases); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (same); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (same); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (same). While I recognize, of course, that this Court is not bound to interpret the gubernatorial pardon power codified in the Revised Organic Act in the same manner

as the Supreme Court of the United States has interpreted the presidential pardon power embodied in the United States Constitution, the federal interpretations should not be dismissed lightly, particularly when they predate adoption of the Revised Organic Act. *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 418-19 (V.I. 2016).

¶ 33 Again, however, I reiterate that the question ultimately before this Court is one of statutory interpretation: what does the phrase “does not result in a conviction” mean as it is used in section 3733(b)? The majority interprets the phrase quite literally: if a criminal defendant was convicted, then the proceeding resulted in a conviction, regardless of what may have come after. But while literal interpretations of statutes are preferred, this Court has repeatedly emphasized that “[a] statute should not be construed and applied in such a way that would result in injustice or absurd consequences” or “is otherwise inconsistent with the Legislature’s intent.” *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009) (collecting cases).

¶ 34 The obvious problem with the majority’s literalist interpretation of the phrase “does not result in a conviction” is that a gubernatorial pardon is not the only means to set aside a conviction. The Superior Court may set aside a conviction by granting a post-judgment motion for judgment of acquittal. This Court, on direct appeal, can reverse or vacate a conviction. A territorial or federal court could set aside a conviction as part of a collateral proceeding for writ of habeas corpus, even many years after the conviction. And, of course, the governor may, as a last resort, grant a pardon. But in all those situations, the proceeding certainly “result[ed] in a conviction” even though that conviction is later set aside. Under the majority’s reasoning, individuals who have a motion for judgment of acquittal granted after trial, or have a conviction reversed by this Court due to insufficiency of the evidence, or obtain vacatur of a conviction in a habeas corpus proceeding based on a successful claim of actual innocence, could never qualify for a discretionary

expungement under section 3733(b), yet the same defendant could qualify if the error had been corrected at an earlier stage of the proceeding. To give perhaps the most extreme example, a defendant who orally moves for and is granted a judgment of acquittal before the case is submitted to the jury would, under the majority's interpretation, qualify for a discretionary expungement under section 3733(b), but the very same defendant would be precluded from obtaining a discretionary expungement if the judge were to take the motion under advisement, allow the matter to be submitted to the jury, and then grant the motion afterwards based on the same evidence and arguments.

¶ 35 The Legislature could not have possibly intended to draw such fine and absurd distinctions. This is evidenced by the legislative findings preceding the “Second Chance for Jobs, Housing and Education After a Misdemeanor Conviction Act,” which state that “people convicted of a misdemeanor offense and serving less than one year in jail need a second chance” and that “[m]any people who plea to a misdemeanor offense and serve only a few days to a few weeks in jail are unable to find work or housing after their conviction” and “are then unable to provide support for their family, children, and some become a burden on society despite their ability and willingness to work.” It is difficult to conceive of any rational reason why the Legislature would grant the right to seek expungements to individuals who were—and remain—convicted of misdemeanors and served jail time for those offenses, and to individuals charged with felonies who were acquitted by a jury or had felony charges dismissed prior to trial, but withhold that right from individuals who were wrongfully convicted of a felony by a jury and only received vindication afterwards, from even seeking a discretionary expungement. In fact, such differential treatment could very well infringe on the guarantee that “[n]o law shall be enacted in the Virgin Islands which shall . . . deny to any person therein equal protection of the laws.” 48 U.S.C. § 1561. It is far more

plausible that the Legislature intended for the phrase “does not result in a conviction” in section 3733(b) to simply mean that the defendant is not convicted, regardless of whether the defendant obtained vindication prior to trial, during trial, after trial, on appeal, through a habeas proceeding, or—as relevant here—by obtaining a pardon.

¶ 36 For these reasons, while I agree that a pardon, standing alone and without more, does not mandate the expungement of any court records, I respectfully dissent from the majority’s holding that section 3733(b) does not permit a discretionary expungement under such circumstances.

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice